The Concrete Company *and* International Brotherhood of Teamsters, Local 991. Cases 15–CA–16039 and 15–CA–16096

December 19, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 11, 2001, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order[2] as modified below.

1. The judge found that the Respondent violated Section 8(a)(1) by informing employees of its predecessor "[t]here's no union; the Union's gone." We agree. We further agree that because of the statement, the Respondent was not privileged to unilaterally set initial terms and conditions of employment.[3] Accordingly, we adopt the judge's remedy requiring the Respondent to restore the terms and conditions of employment under the predecessor's contract with the Union until it negotiates a new contract with the Union or negotiates to impasse. See *Advanced Stretchforming International,* 323 NLRB 529, 531 (1997), enfd. in part and remanded for further consideration 233 F.3d 1176 (9th Cir. 2000). Such a remedy is consistent with our previous decisions, and with the equitable principle that any uncertainty created by the respondent's own misconduct should be resolved against it. See, e.g., *State Distributing Co.,* 282 NLRB 1048, 1048–1050 (1987). The courts have enforced this requirement in similar cases.[4]

2. The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Titus James Edwards and Calvin Mack Taite on December 20, 2000, because of their respective positions as job steward and alternate job steward. The Respondent excepts, asserting, in part, that it lawfully did not hire the discriminatees both because it did not have positions available for all of the predecessor's employees and because Edwards and Taite were among the least experienced of the predecessor's employees.

We find that the evidence set forth by the judge amply supports the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Edwards and Taite. In this regard, consistent with our decision in *FES,* 331 NLRB 9, 10 (2000), the judge found that Respondent had concrete plans to hire, the discriminatees had experience or training relevant to the announced or generally known requirements for the positions, and antiunion animus was a motivating factor in the decision not to hire them. Further, the judge rejected the Respondent's contention that it did not have positions available for all of the predecessor's employees and that it chose not to hire Edwards and Taite because they were among the least experienced of the predecessor's employees. The judge found no credible evidence in support of this contention, finding instead that it was revealed as pretext by the Respondent's December 20 hiring of employees of the predecessor with less experience than Edwards and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge's recommended remedy shall be modified to specify that the Respondent shall make whole unit employees for losses resulting from its unlawful unilateral changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Any additional amounts owed to fringe benefit funds shall be resolved at the compliance stage of this proceeding. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 15 (2001).

[3] We do not rely on the Respondent's unlawful refusal to recognize and bargain with the Union as the employees' collective-bargaining representative. Rather, as discussed above, we rely on the judge's finding that, prior to refusing to recognize the Union, the Respondent informed employees that there would be no union at its facilities.

[4] See *Operating Engineers Local 465 v. NLRB*, mem. 221 F.3d 196 (D.C. Cir. 2000), enfg. *Daufuskie Island Club & Resort*, 328 NLRB 415 (1999); *Pace Industries v. NLRB*, 118 F.3d 585, 593–594 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1468 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997); *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996); *NLRB v. New Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB,* 944 F.2d 1305, 1322–1323 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992); *Systems Management, Inc. v. NLRB*, 901 F.2d 297, 307 (3d Cir. 1990); *American Press, Inc. v. NLRB*, 833 F.2d 621, 627 (6th Cir. 1987). Cf. *Advanced Stretchforming*, supra, 233 F.3d at 1183–1184 (restoration of initial terms until successor negotiates new contract or to impasse is required unless successor shows through definitive evidence that it would not have agreed to the initial terms even if it had acted lawfully). But see *Capital Cleaning Contractors v. NLRB*, 147 F.3d 999, 1010–1012 (D.C. Cir. 1998).

Our dissenting colleague takes particular exception to the fact that the judge's remedy requires the Respondent to cancel only those unilateral changes that the Union requests be cancelled. This remedy is consistent with the Board's standard approach to redressing the violation found. See *Daufuskie Island Club & Resort*, supra at 424; *Brown & Root, Inc.,* 334 NLRB 628, 632 (2001); *Waterbury Hotel Management LLC,* 333 NLRB 482, 486 (2001). Our approach is designed to effectively take into account the desires of the employees affected by the Respondent's misconduct. See *KXTV*, 139 NLRB 93, 96 (1962).

Taite, and by its subsequent hiring of two employees not employed by the predecessor, one of whom had less experience than Edwards and Taite and the other who had no experience. Under these circumstances, assuming without deciding that *FES* is applicable in cases involving refusals to hire in the successorship context, we agree with the judge that the Respondent failed to rebut the General Counsel's initial showing that union animus motivated the Respondent's decision not to hire the two discriminatees.

Alternatively, we find, for the reasons stated by the judge, that the General Counsel has established under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that Edwards and Taite's respective positions as job steward and alternate job steward were a motivating factor in the Respondent's decision not to hire them. We further agree with the judge that the Respondent failed to establish its affirmative defense under *Wright Line* that it would have refused to hire Edwards and Taite in any event. In this regard, as discussed above, the judge found that the reasons relied on by the Respondent for refusing to hire Edwards and Taite were pretextual.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Concrete Company, Columbus, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c):

"(c) Within 14 days of this Order, offer Titus James Edwards and Calvin Mack Taite jobs that they applied for, or would have applied for, had it not been for the Respondent's refusal to employ them, or if such jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any rights or privileges previously enjoyed."

2. Substitute the following for paragraph 2(f):

"(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, dissenting in part.

I agree that the Respondent's statement (that there would be no union at its facilities) violated Section 8(a)(1). However, I do not agree that the statement should cause a forfeiture of a successor employer's right to unilaterally set initial terms and conditions of employment. See my dissenting opinion in *Pacific Custom Materials*, 327 NLRB 75 (1998).

In addition, and for the same reason, I would calculate backpay under Respondent's initial terms and conditions. Further, I particularly object to the judge's remedy, adopted by the majority, that would permit the Union to "cherry pick", i.e., to choose Respondent's terms if it likes them and the predecessor's terms if it does not. This "best of both world's remedy" has no basis in law or remedial policy.

My colleagues rely on cases where a union is given the option to require the recission of, or to leave in place, a unilateral change. However, where, as here, the change is a package of terms and conditions of employment, I know of no authority that would permit the union to "cherry pick" from among the package. That remedy leaves the union free to impose, on the employer, a set of terms and conditions that did not exist before the change, that the respondent never implemented, and that it never agreed to. Further, it is obvious that the Union would choose to retain the economically beneficial parts of the package and reject the economically detrimental ones. The result would be a package that is more expensive than the prior terms and the extant ones. Such a remedy does not restore the status quo ante; it is punitive. I would not impose it.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that there will be no Union at our Mobile, Alabama facilities.

WE WILL NOT discriminatorily refuse to hire individuals because they have engaged in union activities.

WE WILL NOT refuse to recognize and bargain collectively with International Brotherhood of Teamsters, Local 991, as your exclusive collective-bargaining representative, in the following appropriate unit:

> All drivers, loader operators, mechanics, and mechanics helpers employed by the Employer at its Theodore, Alabama, and State Docks, Mobile, Alabama, facilities; excluding all salespeople, clerical/dispatchers, office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT change your wages, hours, terms and conditions of employment without first notifying, and bargaining with, the International Brotherhood of Teamsters, Local 991.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, cancel any departures from your terms and conditions of employment as they existed immediately before our assumption of operations, and WE WILL make you whole for any losses you incurred as a result of any unilateral changes that the Union requests be rescinded, plus interest.

WE WILL, within 14 days of the Board's Order, offer Titus James Edwards and Calvin Mack Taite jobs that they applied for, or would have applied for, had it not been for the Respondent's refusal to employ them, or if such jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from our refusal to employ them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the refusal to hire Titus James Edwards and Calvin Mack Taite and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them on December 20, 2000, will not be used against them in any way.

THE CONCRETE COMPANY

Charles R. Rogers and *Paul J. Buckley, Esqs.,* for the General Counsel.

George G. Boyd Jr. and *William L. Tucker, Esqs.,* for the Respondent.

Charles Sullivan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Mobile, Alabama, on July 17 and 18, 2001. The charge in Case 15–CA–16039 was filed on January 8, 2001, and was amended on March 28, 2001. The charge in Case 15–CA–16096 was filed on February 26, 2001, and was amended on March 22, 2001. The consolidated complaint issued on May 31, 2001. The complaint alleges that the Respondent, The Concrete Company, is a successor employer to Southern Ready Mix, Inc., and that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing to recognize and bargain with the Union and by making various unilateral changes in employees' terms and conditions of employment. The complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire Titus James Edwards and Calvin Mack Taite. At the hearing, the complaint was amended to include a statement alleged to violate Section 8(a)(1) of the Act. The Respondent's answer denies successorship and all violations of the Act. I find that the Respondent is a successor and that it violated the Act substantially as alleged in the amended complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, the Concrete Company (Concrete), is a corporation headquartered in Columbus, Georgia, engaged in the business of producing and delivering concrete at various locations, including its facilities at Mobile, Alabama. During the past year the Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of Georgia. The Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent amended its answer at the hearing to admit, and I find and conclude, that International Brotherhood of Teamsters, Local 991, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Union was certified as the collective-bargaining representative of the employees of Southern Ready Mix, Inc. on October 4, 1999, in the following appropriate unit:

> All drivers, loader operators, mechanics, and mechanics helpers employed by the Employer at its Theodore, Alabama, and State Docks, Mobile, Alabama, facilities; excluding all salespeople, clerical/dispatchers, office clerical employees, guards, professional employees, and supervisors as defined in the Act.

On January 24, 2000, the Union and Southern Ready Mix entered into a collective-bargaining agreement that was effec-

tive by its terms from February 1, 2000,[1] through January 31, 2003.

Daniel Allen was the general manager for Southern Ready Mix in the Mobile area. He holds the same position with Concrete. Around Thanksgiving, he learned that U.S. Aggregates, the parent of Southern Ready Mix, was seeking to divest itself of Ready Mix concrete operations. In early December, at an employee safety meeting/Christmas Party, held at a local restaurant, Allen was asked about the possible sale of Southern Ready Mix. He recalls responding that whatever happened "we would be better off."

Southern Ready Mix's facilities in Mobile were sold to Ready Mix USA at 9 a.m. on December 18, and then sold to Concrete. Ready Mix USA never operated the business.

Before addressing the numerous unilateral changes that are alleged in the complaint, it is necessary to determine whether Concrete is a successor to Southern Ready Mix at its Mobile facilities, and, if so, whether it was privileged to determine the initial terms and conditions of the employment of the employees in the unit without notice to and bargaining with the Union.

B. Successor Employer

1. Facts

On Saturday, December 16, pursuant to the pending sale to Ready Mix USA, Allen met with two representatives from that company, and they performed a physical inventory of the equipment of Southern Ready Mix. This process was repeated on Sunday, December 17, with representatives of Concrete, Senior Vice President Jim Goudie, who is over all ready mix concrete operations, and Vice President Todd Daigle. In conversation with Allen on Sunday, December 17, and Monday, December 18, Goudie stated that Concrete "would be operating one plant, the Theodore plant, instead of operating two plants. We would base all of our drivers at the Theodore plant and just use the State Docks plant as a satellite plant, open as needed." Goudie told Allen that Concrete "would not be hiring all the employees, so I needed to be thinking about that. That we had too many. That they [Concrete] operated very lean." Allen testified that he disagreed on both counts and told Goudie that he "thought we needed all the employees and . . . both plants in order, you know, to . . . continue good service to our customers, but I lost both arguments." Goudie also informed Allen that he did not want a union.

On Monday, December 18, the drivers of the ready mix concrete trucks reported to work as normal and made deliveries. Ronnie Sutton, plant manager at the State Docks plant, informed Titus James Edwards, job steward at the State Docks plant, that the employees were no longer employed by Southern Ready Mix, that there was a new owner, Frank Foley, out of Columbus, Georgia. Foley is the president of the Concrete Company.

Goudie denied that Concrete had assumed operational responsibility on Monday, testifying that "we were kind of waiting for news . . . that all the documents had been signed." Although the Respondent's brief asserts that the agreement between Ready Mix USA and Concrete was not executed "until Thursday of the following week," this assertion is unsupported by any record evidence. The agreement was not placed into evidence, and it was not offered as a posthearing exhibit. When, at the hearing, Goudie was asked when the agreement was actually executed, he responded that the "attorneys would probably know better than I do."

The date of the formal execution of the agreement between Concrete and Ready Mix USA is immaterial. The record is clear that Concrete had assumed operational responsibility by December 19. The Respondent stipulated that "[o]n or about December 18, 2000, Respondent implemented the following initial terms and conditions of employment of employees . . . at its Theodore and Mobile facilities." On Tuesday, December 19, Goudie brought "some of our key people" to Mobile to assist in processing employee applications. Concrete also began exercising control over the work force. On December 19, Goudie wrote Allen a note reporting that, at 11:30 a.m., he had observed the loader operator at the Theodore plant asleep in his loader. On the afternoon of December 19, Allen called this employee aside and stated that he could not fill out an application for employment with Concrete because "my boss will not hire you back because you were in the loader asleep." On the afternoon of Tuesday, December 19, the drivers were called from their routes to the office at the Theodore plant where they were provided with job applications by Concrete. Late in the afternoon, Allen directed all of the employees who were filling out applications to report to the garage shop area for a meeting. At the meeting, Allen introduced Vice President Goudie to the employees, and Goudie introduced the management officials of The Concrete Company whom he had brought to Mobile. Goudie and the management officials addressed the employees regarding Concrete's operations and informed the employees of the company's benefit plans.

The Board, in *Golden Cross Health Care of Fresno*, 314 NLRB 1201 (1994), affirmed the findings of the administrative law judge that "successorship can occur during a transition period," that the critical inquiry is the date a successor assumes control over the operations of the predecessor, not the date that "ownership actually changes hands." Id at 1205. See also *East Belden Corp.*, 239 NLRB 776, 791 (1978), enfd. mem. 634 F.2d 635 (9th Cir. 1980).

In the course of the meeting on December 19, Job Steward Edwards recalled that Goudie stated that The Concrete Company owned 35 companies and "none of them was union and none of them would be union." Employee Maurice Edwards acknowledged that he could not report precisely what Goudie said. Alternate Job Steward Calvin Mack Taite recalls that Goudie was asked about the Union and that Goudie replied that "[t]here's no Union; the Union's gone." Goudie then continued to speak about the various benefits offered by The Concrete Company. Goudie testified, "I've been . . . trying to remember . . . . I think . . . . I said that we were not union. The Concrete Company was a non-union company. . . . I think I said that . . . when we bought Augusta." The Respondent, contending that the sale to Concrete had not been finalized, argues that this statement was correct when Goudie made it. Goudie's recollection, which I do not credit, was uncertain and dependent on his recalling what he thought he said when the Respondent

[1] All dates are in 2000 unless otherwise indicated.

"bought Augusta." Goudie did not deny stating that there would be no union at Mobile. Whether Goudie stated that none of the Respondent's facilities "would be union," as recalled by Edwards, or whether he stated, "[t]here's no union; the Union's gone," as recalled by Taite, the foregoing mutually corroborative and credible testimony establishes that Goudie made clear to the employees that there would be no union at the Mobile facilities.

When the meeting concluded, the employees who had not completed their applications were directed to do so during the evening and to submit them the following day.

Concrete hired all but seven of the Southern Ready Mix employees.

Following the meeting, Edwards telephoned Union Business Agent Charles Sullivan and informed him that Concrete had held a meeting with the employees in which the employees were told that there would be no union and that Concrete would be hiring. Sullivan wrote Concrete on January 5, 2001, inquiring whether Concrete intended to abide by the collective-bargaining agreement and, if not, when the parties could commence contract negotiations. Concrete responded on January 21, 2001, stating that it declined both options.

Concrete uses a formula in the production of its concrete that is different from the formula used by Southern Ready Mix. Allen explained that the aggregate used by Concrete is river rock whereas Southern used limestone. The basic ingredient of the concrete, portland cement, is the same. The final product, ready-mix concrete, is the same. The Ready Mix trucks are loaded from the same plants as those operated by Southern, although all drivers now report to the Theodore plant and the State Docks plant is used only when necessary. Trucks used by the drivers have been repainted, and some new trucks have been added to the fleet, but the daily routine of the drivers has not changed. They go to the plant where their trucks are filled and they then deliver concrete to customers. There is no evidence of any change in the customer base served by Concrete. As Manager Allen explained, "[Y]ou're always trying to pick up customers, and unfortunately you lose customers." The types of customers served by Concrete are the same as those served by Southern Ready Mix.

Goudie testified that, pursuant to its centralized operations, employees from Mobile are subject to being assigned to work at other locations. He explained that Concrete also operates a mobile unit that is set up for specific projects and that employees from its various locations may be assigned to work at this unit, thus removing them from their normal reporting location. There is no evidence that the foregoing has had any effect on unit employees at Mobile. Concrete offered no documentary evidence relating to temporary transfers. Allen acknowledged that the longest any Mobile employee has been directed to work from other than his normal location was one day.

2. Analysis and concluding findings

The Respondent argues that it is not a successor since it has not continued to operate the facilities in unchanged form and that the unit is no longer appropriate. In support of this argument, the Respondent points out that it now operates the State Docks plant only when needed, uses a different supplier of concrete mix and different aggregate, has added some customers and lost others, operates in a more centralized manner, "regularly" dispatches employees to other locations on a temporary basis, and disseminates personnel policies from Columbus, Georgia.

Southern Ready Mix did not operate both facilities all of the time. Allen acknowledged that when one of the facilities was not operating, drivers were dispatched from the plant that was operating on the basis of a single-seniority list. Regardless of the supplier and aggregate, the product, ready-mix concrete, is the same. Although, as Allen explained, "[Y]ou're always trying to pick up customers" and you lose customers, there is no evidence of any change in the type of customers or the customer base served by the Respondent. There is no probative evidence that employees from Mobile are "regularly" dispatched to other locations. Allen testified that the longest period that any employee from Mobile had been directed to work from other than his normal location was 1 day. Centralized control of corporate operations does not render a single-facility unit inappropriate. *Bowie Hall Trucking*, 290 NLRB 41, 43 (1988).

The Board utilizes the following criteria, as set out in *Border Steel Rolling Mills*, 204 NLRB 814 (1973), in evaluating whether an employer is as successor: (1) whether there has been a substantial continuity of the same operations; (2) whether the new employer utilizes the same plant; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the new employer employs the same supervisors; (6) whether the new employer uses the same machinery, equipment and methods of production; and (7) whether the new employer manufactures the same product or offers the same services.

In the instant case, the Respondent meets all the *Border Steel* criteria for successorship. The Respondent has continued the same operations at the same plants, although it now uses the State Docks plant only when necessary. The same employees, initially reduced by seven, are performing the same jobs under the same supervision as they did as employees of Southern Ready Mix. Although providing some new trucks and making improvements at the plant, the Respondent uses the same machinery, equipment, and methods of production as did Southern Ready Mix. Although using a different formula and aggregate in the production of concrete, the basic ingredient, portland cement, and the final product, concrete, are the same. I find that Concrete, having purchased the assets of Southern Ready Mix from Ready Mix USA, which never operated the business, is a successor employer to Southern Ready Mix. See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

A successor employer that honors its legal obligations towards a labor organization that represents the employees of the predecessor is generally permitted to determine the initial terms and conditions of employment of the employees that it hires. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). If, however, a successor employer ignores its legal obligation by stating that it will not recognize the employees' collective-bargaining representative, it forfeits the right to prescribe initial terms and conditions of employment. The foregoing principle is

clearly stated by the Board in *Advanced Stretchforming International*, 323 NLRB 529 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000):

> A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a successor are incurred." *State Distributing*, 282 NLRB at 1049.
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> In sum, we hold that by declaring at the outset that there would be no union at its facility, the Respondent, like a successor that discriminatorily refuses to hire a majority of its predecessor's employees in order to avoid recognizing and bargaining with a union, forfeited its *Burns* right to set initial terms and conditions of employment without first bargaining with the Union. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages and benefits when it commenced operations. [Id at 530–531.]

Consistent with the foregoing precedent, I find that Goudie's informing the employees that its Mobile facilities would not be union, "[t]here's no union; the Union's gone," violated Section 8(a)(1) of the Act. Insofar as the Respondent unlawfully failed and refused to recognize the employees' collective-bargaining representative in violation of Section 8(a)(5) of the Act, any change in the employees' terms and conditions of employment also violated Section 8(a)(5) of the Act.

C. The Unilateral Changes

The complaint alleges 18 unilateral changes. It is undisputed that there was no notice to or bargaining with the Union regarding any of the alleged changes; however, the record does not establish a violation in each and every instance alleged. The Respondent proposed stipulations, which counsel for the General Counsel accepted at the hearing, that acknowledge that, on or about December 18, the Respondent "implemented the following initial terms and conditions of employment of employees . . . at its Theodore and Mobile facilities." The listing admits certain of the alleged unilateral changes. The changes shall be discussed by subparagraph number as they appear in paragraph 18 of the complaint.

a. Transferred unit employees based at the Mobile State Docks plant to the plant in Theodore, Alabama.

The Respondent stipulated that employees "have been primarily based" at the Theodore facility and that the Mobile facility is used only as a satellite facility. Allen's testimony establishes that all drivers are now based at the Theodore plant. Thus, consistent with the complaint allegation, employees based at the State Docks plant were transferred. Although drivers who were based at the State Docks were dispatched to Theodore "almost every day," their reporting location was at the State Docks, which was in the proximity of the residences of many of the employees. The unilateral transfer of these employees violated Section 8(a)(5) of the Act. *San Antonio Portland Cement Co.*, 277 NLRB 309, 314 (1985).

b. Paid the employees for the first week of operations for 45 hours regardless of whether they had not worked a full 45 hours and Respondent has since then been recouping the overpayment from those employees who had not worked a full 45 hours by withholding $15 a week from their paychecks.

There is no probative evidence supporting this allegation. The stipulation reflects that employees "were advanced money to cover any delay in payment as they were hired" and that "[s]uch advances are being incrementally recovered." Goudie testified that "we advanced some folks the money." The record does not establish the amount of money, the identity of the employees affected, or the arrangements for repayment. This allegation appears to be based on Titus Edwards' testimony regarding Goudie's remarks at the December 19 meeting. Edwards understood Goudie to have said that that all employees would be paid for 45 hours for their first week of work, that they would be paid by Southern Ready Mix for December 18 and by the Concrete Company for the remainder of the week, and that any excess wages would be recouped at the rate of $10 to $20 a week. There is no evidence that this occurred. If it had occurred, the General Counsel could have obtained pay stubs from the affected employees or, pursuant to subpoena, obtained payroll documents reflecting the payment and subsequent deductions. There is no evidence that any employee was paid for hours not worked. There is no evidence that any employee was paid for 45 hours. There is no evidence establishing that any employee was overpaid or, if there was an overpayment, the manner in which any overpayment was recouped. I shall recommend that this allegation be dismissed.

c. Reduced the number of employees while increasing the number of hours each employee works.

The Respondent stipulated that Concrete employed fewer employees and that, "depending on workload," employees have the opportunity to work more hours. The record contains no evidence establishing that the workload increased after Concrete assumed operations. Notwithstanding the foregoing stipulation, there is no probative evidence establishing the complaint allegation that there was an increase in the number of hours that each employee worked. I shall recommend that this allegation be dismissed.

d. Brought drivers from other facilities owned by Respondent to perform work usually performed by the unit.

Allen testified that "when we're overbooked we call a central number and ask for some help and they send . . . what they can." There is no evidence that this actually occurred and, even assuming that it did, there is no evidence establishing the number of times it occurred. Allen's testimony that business is "slow right now" suggests that any such requests for help, if made, have been infrequent. There is no evidence of any occasion on which assistance was provided and a unit employee was deprived of any work as a result of such assistance. I shall recommend that this allegation be dismissed.

e. Announced an incentive program whereby drivers who had no safety violation over a 6-month period would receive a bonus of $1 per load.

The Respondent acknowledges providing this benefit that was not provided in the contract between the Union and Southern Ready Mix. By increasing employee benefits without notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) of the Act.

f. Increased the wages of unit employees.

The Respondent acknowledged that it "set the wages of its employees at a higher level then the wages of the employees of Southern Ready Mix." The Respondent, having unlawfully declared its intention to operate without a union, forfeited its right to set initial terms and conditions of employment. The Respondent, by unilaterally changing employee wages violated Section 8(a)(5) of the Act.

g. Changed medical and dental insurance benefits.

h. Changed disability insurance benefits.

i. Changed life insurance benefits.

j. Changed 401(k) program benefits.

k. Changed vacation benefits.

The Respondent acknowledged making all of the foregoing changes. Review of the collective-bargaining agreement reveals no provisions relating to disability or life insurance benefits, thus, as with the bonus, these benefits were granted without notice to or bargaining with the Union. The changes in medical and dental insurance benefits, 401(k) program, and vacations all relate to employee terms and conditions of employment. By granting new benefits and changing existing benefits, the Respondent violated Section 8(a)(5) of the Act.

l. Ceased basing the assignment of work on seniority.

The only current employee who testified, Maurice Edwards, was not questioned regarding the manner in which job assignments were made. The Respondent stipulated that it "does not assign all work on the basis of seniority." The collective-bargaining agreement reflects that employees are to be dispatched in order of seniority. Testimony suggests that seniority also played a part in establishing employee reporting times. The stipulation that the Respondent "does not assign *all* work" on the basis of seniority does not establish that the Respondent does not assign *some* work on the basis of seniority. In order to establish this violation, it was incumbent on the General Counsel to adduce evidence that the Respondent deviated from the contract and past practice. No such evidence was adduced. Although the Respondent may have departed from the seniority provisions contained in the contract or past practice, the bare stipulation that the Respondent "does not assign all work on the basis of seniority" does not establish the violation alleged in the complaint. I shall recommend that this allegation be dismissed.

m. Began regularly scheduling employees to work on Saturday.

The Respondent acknowledges that it schedules employees to work on Saturday. The collective-bargaining agreement reveals that employees of Southern Ready Mix also worked on Saturdays since it provides that employees who work on Saturday are paid straight time unless the hours that they work place then over 40 hours for the week or unless they work more than 8 hours on Saturday. There is no testimony or other evidence establishing that unit employees were not previously scheduled to work on Saturday. The General Counsel has not established that the scheduling of employees to work on Saturday constituted a change in their working conditions. I shall recommend that this allegation be dismissed.

n. Discontinued paying employees overtime when they worked more than 8 hours a day.

o. Discontinued paying employees at twice their regular rate of pay for working on Sunday.

The Respondent admits that it pays time and one-half after 40 hours and does not pay double time. The collective-bargaining agreement provides that employees be paid time and one-half for any hours in excess of 8 hours that they work on a single day and double time for work on Sunday. The foregoing constituted a unilateral change in the employees' terms and conditions of employment and violated Section 8(a)(5) of the Act.

p. Required as part of the hiring process that employees pay for physicals and drug testing.

The Respondent admits requiring that applicants make the foregoing payments but notes that it refunds the cost if the applicant passes the test. The General Counsel presented no evidence relating to this allegation other than the collective-bargaining agreement. The agreement reflects that Southern Ready Mix would bear the cost of such testing of existing employees. It is silent regarding who bears the cost with regard to applicants. The General Counsel has not established that the foregoing constituted a change. I shall recommend that this allegation be dismissed.

q. Ceased withholding of union dues from paychecks.

The Respondent admits the foregoing conduct. Deduction of union dues is a matter of contract. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962); *Valley Stream Aluminum,* 321 NLRB 1076 (1996). Although the Respondent herein was not privileged to alter the terms and conditions of employment of the unit employees without notice to and bargaining with the Union, The Concrete Company was not party to the contract. The contract does not purport to bind a successor to its terms. The Respondent had received no authorizations from employees to deduct union dues from their wages. The prohibitions in Section 302 of the Act preclude any deduction from employee wages or payments by an employer to a labor organization without the specific authorizations set out therein. The Respondent did not violate the Act by failing to deduct union dues from employee wages. I shall recommend that this allegation be dismissed.

D. The Refusals of Hire

1. Facts

On Tuesday, December 19, Titus James Edwards and Calvin Mack Taite had begun filling out applications for employment with Concrete. They were interrupted when they were directed to go to the meeting at which Goudie spoke with the employees. Consistent with the instructions they received, Edwards and Taite completed their applications that evening and brought them to work the following day.

On Wednesday, December 20, Plant Manager Ronnie Sutton told Edwards and Taite to remain at the State Docks plant. They were later informed that Goudie and Allen wanted to talk

to them. Edwards recalls that he began helping a mechanic with a frozen pipe, but Taite recalls that they both remained in the drivers' room with another employee, Kenneth Johnson. When Goudie and Allen arrived, Allen called each employee individually. Johnson was called first. When he returned to the drivers' room he reported that he was told they were going to keep him. Edwards was spoken to next. Edwards recalled that Allen stated, "Titus, we hate it, but as part of the cutback that we're having, we're going to have to let you go." Allen stated that it was nothing personal. Edwards commented that it did not appear that they needed his application, and Allen replied that he did not. Allen then asked Taite to join Goudie and him. Allen stated that "it's wintertime and work's slow, and we can't hire you back on." Taite did not attempt to give Allen his application.

Allen testified that, following his conversations with Goudie on December 17 and 18, in which Goudie had stated that he did not want a union and that Concrete "would not be hiring all the employees," he decided to eliminate seven positions: four drivers, a loader operator, one salesman, and "a lady in the office." The four drivers eliminated included Edwards and Taite. Allen noted that Goudie had stated that Concrete was going to operate the State Docks plant as a satellite plant, only when necessary, and that Edwards and Taite were the two least experienced drivers at that plant. He testified that "had it not been for another guy, who was out with back surgery and I didn't know his future, and another guy who . . . . had a terrible attendance record in Theodore, ... there would have been two more drivers in the docks that I didn't retain. But I did take the guy with the poor attendance record and not recommend him and the guy that was out, I did not recommend him. So . . . . that was the four." The employee who was out with back surgery was the Theodore plant job steward Bill Shields. Shields had been alternate steward at the Theodore plant. There is no evidence that an alternate steward was appointed at the Theodore plant after Shields became the job steward.

Allen was aware that Edwards was the job steward at the State Docks Plant. His appointment to that position is confirmed by a letter dated October 6, 1999, from Union Business Agent Charles Sullivan to Southern Ready Mix. Allen did not deny Edwards' credible testimony that he and Allen met on over twenty occasions, both formally and informally, in which Edwards was functioning in his capacity as job steward. Taite was appointed alternate job steward at the State Docks plant. Although Allen initially testified that he did "not remember" that Taite was the alternate steward, Business Agent Sullivan testified that he told Allen that Taite was the alternate steward and Taite recalls being identified as the alternate steward at a safety meeting at which Allen was present. Allen did not deny the foregoing testimony of Sullivan and Taite. I credit them and find that, although Taite never took any action as alternate steward because Edwards was always present, Allen was aware that Taite was the alternate steward at the State docks plant.

Notwithstanding their respective positions as job steward and alternate job steward, Allen testified that his decision not to hire them was not made in order to discourage union activity among the employees that he did hire. The basis for Allen's decision, according to his testimony was that the Edwards and Taite, "[t]he two of them were the least experienced" at the State Docks plant which was going to be operated only as a satellite facility.

On being examined regarding whether factors other than their seniority were involved in the selection of Edwards and Taite, Allen testified that, having selected them on the basis of less experience, he recalled that Edwards had been stopped for DUI, that some years previously he had raised his voice to the shop foreman, and that he had also been involved in some problem with the operations manager. Further examination established that the DUI incident occurred in 1998, that Edwards was unable to drive for only a month or 6 weeks, and that there was no recurrence of the problem. Allen could not recall the situation involving the operations manager. He testified that he spoke with Edwards regarding the shop foreman incident, that he could not recall the substance of the conversation, and that Edwards did not receive a warning. Regarding Taite, Allen testified that Taite's "attitude had deteriorated," noting one occasion on which Taite experienced mechanical difficulties with his truck and refused to drive another truck. Allen initially testified that he talked with Taite and told him that "we really needed him to get on [another] truck," but he later recanted that testimony and acknowledged that he did not personally talk with Taite. Thus the report of an alleged refusal to drive a different truck on one occasion is totally hearsay. Although Allen testified that he spoke with Taite regarding his attitude, he acknowledged that it was not "like a warning or anything like that," and that Taite stated to him that "[e]verything's all right."

I permitted counsel for Respondent to examine Edwards regarding a discrepancy between his application for work with Southern Ready Mix, upon which he had reported in 1998 that he had not been convicted of a felony, and his application for work with Concrete, upon which he acknowledged that he had been convicted of a felony. As I stated on the record, the basis for my ruling was consideration of credibility and was not related to Rule 409 of the Federal Rules of Evidence. It is clear that the conviction, which occurred over 10 years ago, in 1983 or 1984, would not have precluded employment with Southern Ready Mix since Taite was hired although his application reported that he had been convicted of a felony, possession of a controlled substance. The Concrete application states that a "conviction will not necessarily bar you from employment."

Furthermore, in view of the admissions by Allen and Goudie that none of the applications were actually reviewed, it is clear that the hiring was based on Allen's knowledge of the employees, not matters reported on the Concrete applications. Goudie admitted that he did not review any of the applications. Allen also did not review the applications. He testified, "I was making the hiring decisions based on history. There was "nothing that was going to be in the applications that would persuade me. [W]e needed a permanent . . . file."

In further testimony regarding the basis for the selection of the employees who would not be hired, Allen testified that "[w]e were closing the docks . . . [a]nd the drivers that worked at the docks tend to live close to the docks, . . and it just seemed to make a lot of sense." He later noted that "the less experience at . . . the plant that we were not going to be operating was the key factor." Allen acknowledged that, on occasions when one

of the two plants was closed for some reason and Southern Ready Mix was operating only one plant, he used one seniority list that included all employees.

Thereafter, Taite applied for employment on February 2, 2001. He gave his application to Allen. Edwards also applied for employment in late January or early February. He also gave his application to Allen.

Allen admitted that there were employees working at the Theodore plant with less seniority and less experience than Edwards and Taite. The record does not establish the identity of these employees.[2]

Employee David Pate was initially hired by Southern Ready Mix on November 12, 1998. He quit sometime in or before November 2000. Edwards began working for Southern Ready Mix on August 19, 1997. Taite began on February 19, 1997. Thus both had well over a year's more experience than Pate. Pate applied for work with Concrete and was hired in about April 2001. At or about the same time Concrete hired another employee who had no experience driving a Ready Mix concrete truck.

2. Analysis and concluding findings

In assessing the evidence under the criteria of *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), I find that the Respondent had concrete plans to hire and that Edwards and Taite had experience or training relevant to the positions for hire. Goudie's announcement that Concrete would not be union, "the Union's gone," thereby depriving the employees of their collective-bargaining agent at this critical time of transition, establishes animus. In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that both Edwards and Taite engaged in union activity and that the Respondent was aware of that activity, specifically that Edwards was the job steward and that Taite was the alternate job steward at the State Docks plant. Antiunion animus was established. The failure to permit Edwards and Taite to continue to work, thereby depriving them of their livelihood, was clearly an adverse action. Thus, whether viewed as a refusal to hire or a termination, the General Counsel established a prima facie case and it was incumbent upon the Respondent to demonstrate that it would not have hired or retained Edwards and Taite in the absence of their union activity.

Allen's testimony that "the less experience at . . . the plant that we were not going to be operating was the key factor," coupled with his explanation that "[w]e were closing the docks . . . [a]nd the drivers that worked at the docks tend to live close to the docks," if credited, would provide a nondiscriminatory explanation for the selection of Edwards and Taite. It is clear that his recollection of Edwards' DUI in 1998 and matters involving the shop foreman and operations manager, which he could not specifically recall were not the basis for his decision. Allen attempted to place Taite in an unfavorable light by testifying, initially, that he personally directed Taite to take another truck. He later recanted this testimony. Taite was not disciplined. The foregoing hearsay report was not a basis for the decision not to hire Taite. According to Allen, the basis for the decision not to hire Edwards and Taite was that "[t]he two of them were the least experienced" at the State Docks plant which was going to be operated only as a satellite facility.

In considering that explanation, I note that the Respondent failed to hire Edwards and Taite after they submitted applications in late January or early February while hiring one employee who had no experience and David Pate, who had quit in or before November and who had less experience than either Edwards or Taite. Although the complaint does not allege that the Respondent unlawfully failed to hire Edwards and Taite after they submitted applications in late January or early February 2001, the hiring of in April of an employee with no experience and of Pate, who had less experience than Edwards or Taite, is compelling evidence that Allen's explanation regarding his basis for determining who not to hire was false.

I do not credit Allen. Goudie had told Allen on December 17 or 18 that he did not want a union. Edwards had met with Allen on over 20 occasions in his capacity as job steward. The collective-bargaining agreement provided for unit seniority. According to Allen's testimony, following his conversations with Goudie, he understood there was to be only one reporting location, the Theodore plant. Thus, the reporting facility of all employees at the State Docks plant was going to change. All employees from the State Docks plant except Edwards and Taite were retained. Despite this, Allen asserts that he chose to eliminate Edwards and Taite because of their seniority at the State Docks plant. The happenstance that Bill Shields, job steward at the Theodore plant and for whom no alternate steward had been appointed, was undergoing surgery assured that there was no employee present at that plant who had previously been involved in overseeing compliance with the collective-bargaining agreement. When Southern Ready Mix had operated only one facility, Allen had used a single seniority list. By eliminating the job steward and alternate steward at the State Docks plant, purportedly because they were the least experienced at that location, Allen eliminated the only remaining job steward and alternate job steward in the unit. I find Allen's testimony regarding the basis for his decision to be incredible. Allen testified that he sought to retain all employees and keep both plants open. He acknowledged that, after speaking with Goudie, "I lost both arguments." Allen's acknowledgement that he "lost both arguments" reflects that he became amenable to what he understood Goudie wanted. Allen knew that Goudie did not want a union. I find that Allen's decision to eliminate the only job steward and assistant job steward present in the unit was discriminatorily motivated to assure that no job stewards would be present as Concrete began its nonunion operations.

Even if I were to assume that I had some doubt regarding the foregoing finding and were to give the Respondent the benefit of that doubt, such doubt would be totally erased by the hiring

[2] No current seniority list was placed into evidence. A seniority list dated December 12, 1999, reflects that Willis Finch and David Nesmith, who were assigned to the Theodore plant, both had less seniority than both Edwards and Taite. The inclusion of their names on the last submission by the Union to Southern Ready Mix for deduction of union dues suggests that they continued to be employed. Even if their employment had ended, Allen admitted that there were employees at the Theodore plant who continued to work and who had less seniority and experience than Edwards and Taite.

of an employee with no experience and Pate rather than Edwards and Taite in April. I place little weight on Respondent's rehire of job steward Bill Shields after he recovered from surgery since the Respondent had removed all of the job stewards identified in the record from the unit at the critical time of its assumption of operations. There was no pending unfair labor practice charge relating to Shields. The Respondent was aware that its actions were under scrutiny since the Union had filed the charges regarding Concrete's failure to hire Edwards and Taite on January 8, 2001.

In view of the foregoing, and the entire record, I find that the General Counsel has established a prima facie case that the Respondent's decision to refuse to hire Edwards and Taite was motivated by its animus towards their positions as union job steward and alternate job steward, respectively. The Respondent's assertion that its selection of them was based on the fact that they were the least experienced employees at the State Docks plant, a portion of the appropriate unit and from which employees were transferred in violation of Section 8(a)(5) of the Act, is not credible and is belied by the hiring to two employees, one with no experience and one with less experience than both Edwards and Taite after Edwards and Taite applied for employment for the second time, early in 2001. In refusing to hire Edwards and Taite, the Respondent violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By informing its employees that there would be no union at its Mobile, Alabama facilities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing to hire employees because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By failing and refusing to recognize and bargain with the Union and by making unilateral changes in the terms and conditions of employment of its employees as found in this decision, the Respondent violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily refused to hire Titus James Edwards and Calvin Mack Taite, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from December 20, 2000, to date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must recognize and, on request, bargain with International Brotherhood of Teamsters, Local 991, as the exclusive collective bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

The Respondent, on request of the Union, must cancel any departures from the terms and conditions of employment that existed immediately before its takeover of Southern Ready Mix, Inc., as found, retroactively restoring any preexisting terms and conditions of employment that the Union requests be restored, and it must make employees whole for any losses they incurred as a result of any unilateral changes that the union requests be rescinded.[3] In this regard, I note that, under the contract, employees were covered by certain Southern Ready Mix benefit plans. The record does not reflect the increase in costs to employees, if any, in maintaining those benefits. Insofar as maintaining those benefits resulted in increased costs to the employees, the Respondent must, if the Union requests recission of any unilateral change related to those benefits, make employees whole for any such cost increase from December 19, 2000, until it negotiates in good faith with the Union to agreement or to impasse. The reimbursement to employees of any increased costs shall be with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). The Respondent must also reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from those unilateral changes that the Union requests be rescinded.

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, the Concrete Company, Columbus, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees that there would be no union at its Mobile, Alabama facilities.

(b) Refusing to hire employees because of their union activities.

(c) Refusing to recognize and bargain with International Brotherhood of Teamsters, Local 991, and making unilateral changes in the terms and conditions of employment of its unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[3] The complaint does not allege the conversion of the State Docks plant to a satellite facility as an unfair labor practice. Thus, although I have found that the unilateral transfer of employees from the State Docks plant violated the Act, I shall not order the reopening of that facility.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Recognize and, on request, bargain with International Brotherhood of Teamsters, Local 991, as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All drivers, loader operators, mechanics, and mechanics helpers employed by the Employer at its Theodore, Alabama, and State Docks, Mobile, Alabama, facilities; excluding all salespeople, clerical/dispatchers, office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) On the request of the Union, cancel any departures from the terms and conditions of employment of the employees in the above described unit that existed immediately before the assumption of operations of Southern Ready Mix, Inc., retroactively restoring any preexisting terms and conditions of employment that the union requests be restored, and make employees whole for any losses they incurred as a result of any unilateral changes that the union requests be rescinded as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, offer Titus James Edwards and Calvin Mack Taite reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Titus James Edwards and Calvin Mack Taite whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Titus James Edwards and Calvin Mack Taite and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them on December 20, 2000, will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Mobile and Theodore, Alabama, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[5] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."